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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	

COMMENTS OF HUGHES NETWORK SYSTEMS, INC. on
ISSUES REMAINING IN IB DOCKET 95-59

I. INTRODUCTION

For more than a decade, the Commission had on its books a satellite antenna zoning preemption rule it was powerless to enforce, and that did little to dissuade local communities from adopting and enforcing discriminatory and unreasonable regulations against the deployment of commercial satellite antennas. With a record that clearly established that these local regulations harmed competition and negated federal communications policy, the Commission in February 1996 amended its satellite antenna zoning preemption rule, 47 C.F.R. 25.104, to adopt a presumptive preemption of local regulations affecting satellite antennas two meters in diameter or smaller in commercial areas, and one meter or smaller in residential areas.[1]

In August 1996, the Commission again amended Section 25.104, this time in order to implement Section 207 of the Telecommunications Act of 1996, which ordered the Commission to prohibit restrictions on antennas delivering video programming via over-the-air

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1 *See Preemption of Local Zoning Regulation of Satellite Earth Stations,* 11 F.C.C. Rcd. 5809 (Report & Order and Further NPRM) (March 11, 1996) (the *"March 1996 Order"*).

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reception devices, including direct broadcast satellite ("DBS") antennas.[2] The August amendment to Section 25.104 and the adoption of a new Section 1.4000, like Section 207 of the Telecommunications Act, had no effect upon the regulation of non-DBS satellite antennas, including very small aperture terminals ("VSATs") used for commercial communications purposes.[3]

The Commission has asked commenters to "supplement and refresh the record on any issue remaining in IB Docket No. 95-59," pursuant to which the February 1996 amendments to Section 25.104 were made.[4] The underlying factual problems that led the Commission to revise Section 25.104 in February have not changed in the interim, and any issues still pending have been raised in several petitions for reconsideration and clarification, including a petition submitted by Hughes Network Systems, Inc. ("HNS"), the nation's leading provider and operator of VSAT antennas and a consistent advocate of the revision of Section 25.104. HNS hereby briefly reiterates its belief that the February 1996 amendment of Section 25.104 is a significant step towards the establishment of a workable regulatory regime. With a few revisions and clarifications, the Commission can achieve the goal it set for itself when it first adopted the rule in

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2 *See Preemption of Local Zoning Regulation of Satellite Earth Stations,* IB Docket 95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service,* CS Docket 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 96-328 (August 6, 1996) (the *"August 1996 Order"*). As will be discussed in a petition for reconsideration of the August 1996 Order, when the Commission removed DBS antennas from the scope of Section 25.104, it inadvertently eliminated the protections afforded residential installations of non-DBS satellite antennas.

3 *August 1996 Order* at ¶ 30 & n.76.

4 *See Preemption of Local Zoning Regulation of Satellite Earth Stations: Comments Sought on Issues Remaining,* Public Notice, Report No. SPB-55 (August 7, 1996).

1986: to provide access to satellite communications and ensure that satellite services compete effectively against other technologies, unencumbered by discriminatory and unreasonably burdensome local regulations.

II. THE REVISIONS TO SECTION 25.104 WERE SUPPORTED BY THE RECORD AND LONG OVERDUE

In 1986, the Commission adopted Section 25.104 in response to evidence that state and local governments were imposing unreasonable restrictions on the installation and maintenance of satellite antennas.[5] Under the 1986 rule, local officials, antenna users and courts were to be guided by a "reasonableness" test that required a three-part ad-hoc balancing of the local objective, the extent of interference with the antenna's reception, and the costs imposed on the antenna user. The exhaustion standards in the 1986 rule required satellite antenna users to exhaust administrative and judicial remedies prior to obtaining relief from the FCC, which in the end precluded all FCC review of its own regulation.

In combination, the unclear balancing test and the unworkable exhaustion requirement provided a door through which local regulators were able to evade the policies of Section 25.104, enacting discriminatory and unreasonably burdensome satellite antenna regulations with virtual impunity. Given the opportunity, local officials "balanced" the factors in favor of their own regulatory power without regard to federal interests, adopting restrictions that increased the cost and delayed the deployment of satellite antennas. For instance, some local regulations required expensive aesthetic screening for even the smallest antennas in commercial areas filled with unregulated dumpsters, signs and other much larger equipment. Other local jurisdictions adopted multi-layered permitting processes that required antenna users to wait

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[5] *March 1996 Order* at ¶ 3.

months to obtain approval for the installation, and then only after submitting unnecessary and expensive engineering drawings, site plans, and other professionally-prepared materials, and enduring hearings and other administrative proceedings.[6]

Antenna users had no realistic means of challenging these restrictive regulations. Under the 1986 rule, an antenna user needed first to exhaust the municipality's administrative procedures (which were often themselves being challenged as unreasonable), and then could proceed to court. While courts generally preempted unreasonable local regulations under Section 25.104, this remedy was available only at a cost that far exceeded the value of the antenna or the satellite services. In other words, under the old rule, an antenna user was forced to suffer the very injustices it challenged *before* it could seek relief from that injustice. The 1986 rule contemplated that the FCC would review these disputes after judicial remedies had been exhausted, but the FCC itself never was able to provide relief under Section 25.104, as the Second Circuit held in *Town of Deerfield v. FCC* that a federal agency could not review the judiciary.[7]

In 1991 and 1993, the Satellite Broadcasting and Communications Association and HNS filed petitions for declaratory ruling, alerting the FCC to these widespread problems. The Commission proposed amendments to Section 25.104 in May 1995, recognizing the significant record of noncompliance with its rule and noting that "any significant burden on a citizen's access to satellite communications must be justified by a local policy that can overcome federal interests in access and competition."[8]

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6 Not surprisingly, because the amended Section 25.104 has been in effect for less than six months, many of these unreasonable local regulations remain on the books.

7 992 F.2d 420 (2d Cir. 1993).

8 *Preemption of Local Zoning Regulation of Satellite Earth Stations,* 10 F.C.C. Rcd. 6982, 7000, ¶ 57 (NPRM) (May 15, 1995) (the *"May 1995 NPRM"*).

First, the FCC proposed to eliminate the balancing test in favor of a rebuttable presumption that local regulation of smaller satellite antennas is unreasonable.[9] The Commission noted that such a rule would accommodate local and federal interests while "providing greater certainty" to both local governments and antenna users.[10]

Second, in response to *Deerfield,* the Commission proposed to abolish the requirement that antenna users exhaust judicial remedies before approaching the FCC for relief. The Commission recognized that it must play a significant role in the interpretation and implementation of its own rule; to abstain from such review would be "inconsistent with [the FCC's] broad statutory responsibility" to make communications services available to all the people of the United States.[11] The Commission proposed to create a simple, paper-only administrative review process for aggrieved antenna users and local authorities.

The record submitted in response to the May 1995 NPRM was overwhelming, showing conclusively that local regulators had time and again ignored federal policy to the detriment of satellite communications.[12] The comments clearly demonstrated that local jurisdictions had no concept of the competitive demands faced by businesses, which require the prompt installation of communications services, often within weeks or days.[13] While the

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9 *Id.* The term "smaller satellite antennas" is used to refer to antennas one meter in diameter or smaller in residential areas, and two meters or smaller in commercial areas. *See* 47 C.F.R. § 25.104(b).

10 *Id.* at 6996, ¶ 45.

11 *Id.* at 6997, ¶ 48 (citing 47 U.S.C. § 151).

12 *March 1996 Order* at ¶ 20.

13 *Id.* at ¶ 20 (citing Comments of E.D. Jones & Co., an investment company that requires communications facilities to be operational as soon as it opens a new office). HNS stated in its comments that it cannot compete as a communications provider if it cannot provide

municipalities vociferously objected to these illustrations as unrepresentative, their own comments underscored the point: the City of Dallas boasted of its "reasonable" antenna approval process that involves public hearings and administrative and judicial review.[14] The Commission could only conclude that many local regulations were "so burdensome that antennas are rendered useless."[15]

The record also showed that smaller satellite antennas do not pose safety or aesthetic problems that are typically the core concern of local regulations.[16] HNS, for example, stated that in its 228,000 "VSAT-years" of experience (70,000 VSATs professionally installed over the course of five years), not once has an antenna been blown from a roof or injured a person.[17] Aesthetic regulation was shown to be unnecessary, as well, particularly in commercial areas where heating and cooling equipment, dumpsters and large signs are typically permitted.[18] The local governments were unable to counter with any evidence that would show that their regulations of smaller satellite antennas were justified or necessary.[19]

Accordingly, in February 1996 the Commission eliminated the balancing test in favor of a presumptive preemption of local regulations affecting smaller satellite antennas.[20]

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service unimpeded by local governmental delays and costs not faced by its competitors, such as the local telephone company. Comments of HNS, filed July 15, 1995.

14 Comments of City of Dallas, filed July 14, 1995.

15 *March 1996 Order* at ¶ 23.

16 *Id.* at ¶¶ 26, 35.

17 Reply Comments of HNS, filed August 15, 1995, at 12-13. Only two VSATs have even moved from their installed locations, one during high winds that moved a jet sitting on a runway at a nearby airport. *Id.* In fact, not one VSAT was lost during Hurricane Andrew in Florida, except where the entire building was destroyed. *Id.*

18 *March 1996 Order* at ¶ 26.

19 *Id.*

20 *Id.*

Under the revised Section 25.104, local regulations are not *per se* invalid, but may be justified upon a showing by the promulgating jurisdiction that it is necessary to accomplish clearly defined local health or safety objectives, no more burdensome than necessary, and specifically applicable to smaller satellite antennas. By placing the burden on the municipality to rebut the presumption, the FCC has forced local jurisdictions to weigh the federal interests more carefully before adopting satellite antenna regulations.

The Commission also eliminated the judicial exhaustion requirement, allowing aggrieved antenna users to petition the FCC for relief in expedited paper-only proceedings after exhausting administrative remedies only.[21] As a result, the FCC has increased its chances of implementing, reviewing, and interpreting its own regulation (although, by giving municipalities the opportunity to seek judicial review, it may have undermined this provision).

III. THE NEW RULE SHOULD BE CLARIFIED AND REFINED

The revised Section 25.104 is a significant improvement over the 1986 rule, which led to a decade's worth of local authorities ignoring federal communications policy. The Commission is now moving toward a workable regulatory regime that will allow both business and personal consumers to gain the same kind of unburdened and affordable access to satellite communications that they have enjoyed with respect to terrestrial services, particularly the landline telephone company. However, as HNS stated in its pending Petition for Reconsideration, before Section 25.104 can reach its potential it must be clarified and refined to provide the kind of

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[21] *Id.* at ¶¶ 45-50; *see also Procedures for Filing Petitions for Declaratory Relief of Local Zoning Regulations and for Waivers of Section 25.104,* Public Notice, Report No. SPB-41 (April 17, 1996).

clear guidance required by local governments and antenna users:

- The FCC must assert exclusive jurisdiction over initial review of disputes arising under Section 25.104. As the Commission learned from *Deerfield v. FCC*, allowing a "court of competent jurisdiction" to review these disputes in the first instance will deprive the Commission of jurisdiction. Moreover, allowing courts to engage in initial review will lead to unnecessary and costly litigation, and could result in binding judgments that deprive satellite antenna users of significant federal rights without notice and an opportunity to respond.

- The FCC should preempt local regulation of radio frequency ("RF") emissions. RF is a national issue requiring national regulation. Piecemeal rules adopted by local authorities without significant experience or knowledge of the technical issues will only undermine federal communications policy and allow Section 25.104 to be circumvented.

- Section 25.104 must be clear to all those who read it in isolation, without the context of the Commission's orders or interpretations. Accordingly, the Commission should clarify in the text of the rule that antenna users are not retroactively liable for noncompliance with local regulations presumptively preempted by Section 25.104. The rule should also provide that no liability may be imposed until the user has sufficient notice of a rebuttal and an opportunity to come into compliance. The Commission should also make clear that smaller satellite antenna users do not need to exhaust administrative remedies, but that it is the promulgating jurisdiction that must rebut the presumption of preemption prior to enforcement.

IV. CONCLUSION

The revisions to the 1986 rule were long overdue and necessary to ensure that commercial satellite communications providers could compete effectively, unburdened by unreasonable and discriminatory local regulations. Neither the record nor the federal policies behind the amendments have changed since that time. HNS therefore urges the Commission to grant its pending petition for reconsideration and dismiss the petitions for reconsideration submitted by the various groups representing local governments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven H. Schulman, certify that I have, this 27th day of September, 1996, served by United States mail, postage prepaid, Comments of Hughes Network Systems, Inc. on Issues Remaining in Docket 95-59, to the following:

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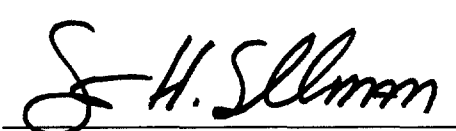

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